legislative policy within the UK's jurisdictions. Meanwhile, progress of the draft Public Service Ombudsman Bill for England and non-devolved UK powers remains Brexit-blocked. It will be interesting to see if in due course Whitehall's disinclination to follow Scotland, Wales and Northern Ireland in fostering more proactive approaches continues. Certainly, this book will have provided insight and perhaps also inspired the conception, funding and execution of multi-disciplinary evaluative empirical research to assist policy formulation, in the UK and elsewhere, on the ombudsman institution.

*Brian Thompson**

Henrique Carvalho, **The Preventive Turn in Criminal Law**, Oxford: Oxford University Press, 2017, 224 pp, hb £60.00.

Theorising about the criminal law inevitably must address tensions generated by, on one hand, the plausible idea that the criminal law is an institution through which the state delivers justice by holding its members responsible for their prior wrongdoing, and on the other hand, the equally plausible idea that the criminal law is an institution through which the state helps to ensure the safety and security of its members. In punishment theory, the tension is reflected in traditional debates between consequentialist and retributivist theorists, and in attempts to move past the consequentialist-retributivist impasse by integrating forward-looking and backward-looking elements into unified normative accounts of punishment. Similarly, the tension is evident in normative theorising about criminalisation, as scholars consider whether the state may legitimately criminalise types of conduct that are not in themselves obviously wrongful if doing so will help to reduce harm to others in the future. In practice, the criminal law plays (or aims to play) both of these roles, doing justice for past offences as well as helping to reduce future crimes, though it does not always balance the roles in a principled or well-integrated way (see, eg, A. Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225). In recent decades, the criminal law in England and Wales, and in other liberal legal systems, has increasingly been used for preventive purposes, as evidenced for example by the rise in 'pre-inchoate' offences such as possession offences or mere preparation offences, and increases in surveillance powers. Some theorists have worried that this expansion of the criminal law's preventive powers represents a troubling break from the foundations of liberal law, which emphasise respecting people as responsible agents by holding them accountable for their autonomous choices.

In *The Preventive Turn in Criminal Law*, Henrique Carvalho argues that expansions in the criminal law driven by the preventive rationale represent not a break with the liberal tradition but rather an expression of a deeply rooted tension within liberal theory itself. Liberal theory regards those subject to the

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law as free, responsible moral agents who should be allowed to shape their lives according to their own autonomous choices. But at the same time it recognises that people can, and often do, exercise their agency in ways that are harmful to other members of the polity. Thus the liberal state is committed to not infringing the autonomous agency of its members, regarded as responsible agents, and also to protecting its members against violations of their autonomous agency by other agents, regarded as potentially dangerous threats. The tension arises because helping to prevent such violations may require the state to act in ways that restrict individuals' autonomous agency.

After setting up the problem in the first two chapters, Carvalho offers in Chapters 3 and 4 a thorough analysis of the ways in which the central tension between responsibility and dangerousness is evident in the liberal theories of Hobbes and Locke, respectively. Chapter 5 then addresses how the tension manifests in the work of Hegel and Bentham. The overarching lesson through these three chapters is that, despite significant differences among these theorists' accounts of the state's exercise of power, and in particular of criminal law and punishment, we can see each of their accounts as, in part, attempts to reconcile the importance of respecting individuals as responsible agents with the need to ensure public safety and security. Carvalho makes a persuasive case in these central chapters that concerns about dangerousness, and the preventive policies that emerge from these concerns, are not a departure from liberal ideals but can be found within the liberal tradition itself.

Of course, many legal and political theorists will readily accept that the aim of crime prevention is not in opposition to liberal theory and can be grounded directly in liberal considerations. Liberal theorists, including twentieth century pioneers such as Hart and Feinberg, explicitly incorporate considerations of prevention into their theories of criminalisation or punishment (more recently, see, V. Chiao, *Criminal Law in the Age of the Administrative State* (Oxford: OUP, 2018)). Carvalho insightfully shows how liberalism's notions of responsibility and dangerousness, and its individualistic conceptions of freedom and autonomy, can manifest differently in different social and political contexts. As a result, the criminal law may change significantly over time, not in the sense of becoming more or less liberal, but as its underlying liberal values are realised in different ways. In Chapter 7 Carvalho contends that the criminal law's excessive focus on prevention in recent decades can be seen as the manifestation of broader social conditions, such as the decline of the liberal welfare state, growing structural inequalities, and increased insecurity among citizens. He writes:

> [T]he last few decades have seen an unprecedented rise in levels of inequality in Western liberal countries, which has significantly affected the experience of socio-political belonging in these societies. The resurgence of dangerousness as a primary concept guiding developments in criminalization ... can thus be seen to be directly connected to 'a crisis of security' in which the perceived danger in crime has been heightened by a general sense of insecurity ... (179).

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For Carvalho, the preventive turn in criminal law is 'as much a reflection of elements embedded within the liberal imaginary and its conception of criminal law as the result of current circumstances and recent events' (135–136).

Carvalho's descriptive account is generally persuasive, but what about its prescriptive implications? We can accept that many of the recent expansions in states' crime preventive powers are troubling developments. If we accept too, that these developments are in part rooted in the liberal legal tradition, is that so much the worse for this tradition? Carvalho says not. His account, he writes, 'should not be seen as a call to abandon the aspirations contained within the liberal model of criminal law' (189). Presumably, then, what is needed is continued work within the liberal tradition to address the tensions between respect for persons and concerns about dangerousness, in theory and also, importantly, in practice.

It is surprising, given these theoretical commitments, to see Carvalho devote Chapter 6 of the book to a critique of one of the leading recent attempts to develop an account of criminal law that prioritises concern for respecting those subject to the law as moral agents, and as members of the polity, over concerns about prevention. This is Antony Duff's well-known communicative theory of criminal law (see, eg, R. A. Duff, *Punishment, Communication, and Community* (Oxford: OUP: 2001)). Duff aims to develop an inclusive account of criminal law and punishment that is appropriate for a liberal political community. A central theme of Duff's work is that the criminal law should treat those subject to it as autonomous agents, rather than merely as dangerous individuals. For example, in critiquing punishment aimed at incapacitation, he writes:

> Respect for another as an autonomous agent does not preclude the attempt to persuade her to behave as we think she should behave ... Nor does it preclude preventing her, if necessary by force, from carrying through a crime on which she has already embarked ... But it does preclude an attempt to *incapacitate* her from *future* wrongdoing. Apart from the fact that incapacitation will also typically incapacitate the person from quite legitimate activities, it deprives her of the ability to determine her own conduct in the light of her own grasp of reasons for action — an ability that is crucial to autonomous agency (*ibid*, 119).

Given Carvalho's concerns about the preventive turn in criminal law, we might think that Duff's position would be just the sort of liberal account he would endorse. In fact, though, Carvalho is deeply critical. In particular, he contends that Duff's communicative enterprise is not genuinely, reciprocally communicative. 'The main idea here,' Carvalho writes, 'is thus not to engage with criminals in reciprocal dialogue, but to convince them of the wrongfulness of their actions' (141). Thus although the communicative process aims to brings citizens to accept the wrongfulness of their conduct, it 'says nothing of recognizing any of the citizen's claims in return' (141-142).

Yet Duff is aware of the importance of giving the offender a voice, of reciprocal communication in punishment. He writes, for example, of the importance

of modes of reparation that themselves communicate the offender's apology (Duff, 95). And he endorses criminal mediation between victim and perpetrator (*ibid*, 96–98) as a paradigm form of criminal punishment. Carvalho's objection is that Duff's model of communication does not extend to threshold definitions of criminal wrongs:

> [B]y pre-establishing the wrongfulness of some course of action and only then pursuing the relationality between individual and community, theories of punishment seem to invert the logic of recognition, thus rendering the proposed communication inexistent at worst, insufficient — because it is one-sided — at best (155).

Penal communication is assuredly not entirely open-ended. In discussing the possibility of criminal mediation, for example, Duff offers the example of mediation between a woman and the husband who has regularly battered her:

> The victim will explain how the crime affected her; the offender will try to explain how he came to commit it. The offender's explanations might appeal to excusing or mitigating factors . . . . But he will not be allowed to argue that his conduct was justified — that husbands have the right to 'chastise' their wives in this way . . . (Duff, 93).

According to Carvalho, 'what transpires is that the offender has a desire that the legal system is presently unable or unwilling to recognize' (155). His suggestion is that we should not presuppose, in the way that (for example) Duff's theory of criminal law would 'pre-establish', that the desire is wrongful. He writes further that the 'normative assumption of the criminal's expectations as wrongful is unable to provide a reciprocal engagement, since it represses the existence of the struggle for recognition' (*ibid*). Later, in discussing career criminals, he asks suggestively 'whether the breach of community in question is a consequence of the criminal's actions, or whether it is primarily related to the social context and consequently only interpreted by the law as being a rejection on the part of the criminal' (159).

Carvalho's picture of crime as merely the consequence of an offender's being trapped in the social context of a state that is unable or unwilling to recognise his desires may be apt in some cases. And we should be attentive to the possibility that in some cases the laws or broader social structures are themselves worthy of condemnation. But this account seems poorly suited to the case of the husband who beats his wife, the racist who assaults a person of colour, the priest who molests young boys, or many other core cases of offending. The idea that the state should take care that its communication with these individuals not make any presuppositions about the wrongness of their behaviour is implausible. Sometimes the appropriate form of reciprocal communication is blame by the state, on behalf of those who have been wronged, and apology and amends-making by the wrongdoer.

Overall, I found the critique of Duff's communicative theory of punishment unpersuasive. It also felt strangely situated in a book focused on examining the liberal foundations of the preventive turn in criminal law, given that Duff, perhaps as much as any legal theorist writing in recent years, has sought to

develop a theory of criminal law that does not sacrifice respect for citizens as autonomous agents for concerns about dangerousness and prevention. Carvalho has nonetheless made a compelling contribution to normative theorising about the criminal law. His account of the conceptual foundations of responsibility, freedom, and dangerousness in the liberal tradition, tracing how the realisation of these ideals in the criminal law varies across broader social contexts, is thorough and persuasive. And his call to recognise the recent 'preventive turn' as happening within rather than against this liberal tradition, should inform continued efforts to resolve, or at least mitigate, the tensions inherent in liberal criminal law.

*Zachary Hoskins**

Kelly Pitcher, **Judicial Responses to Pre-Trial Procedural Violations in International Criminal Proceedings**, Berlin: Springer, 2018, 557 pp, hb £175, eBook £140.

Kelly Pitcher's book on *Judicial Responses to Procedural Violations in International Criminal Proceedings* undertakes an in-depth study of one of the most politically-charged, controversial and enduring questions of criminal evidence and procedure, namely whether pre-trial procedural violations, for which the police or prosecution authorities could be held to account, should trigger judicial remedies. Examination of conventional and frequently encountered judicial remedies, including exclusion of improperly obtained evidence and stays of proceedings for abuse of process, are central to Pitcher's effort to shed light on the multiplicity and complexity of the judicial responses that may be available at the domestic and international levels. The book's equal focus on alternative judicial remedies represents its more novel and distinctive contribution to these debates. Pitcher's foreign law research, and analysis of the law and practice of international criminal tribunals, brings to the fore judicial responses that run parallel to, or sometimes operate as surrogates for, exclusionary rules or stays of the proceedings, namely: *sentence reduction*, the *express acknowledgement of a procedural violation* and affording the defendant *financial compensation*. Criminal procedure scholarship has so far paid little attention to such procedural remedies. Pitcher makes a consistent effort to fill the gap.

This extensively researched book, which was originally submitted as a PhD thesis, is to be applauded for the ambition of its wide-ranging thematic ambit and varied cosmopolitan legal sources. In setting out to explore how judges in international criminal tribunals should respond to procedural violations occurring in pre-trial proceedings, Pitcher's primary analytical tools derive from international human rights law and comparative law, with an emphasis on the provisions of the European Convention on Human Rights (ECHR) and the domestic legal systems of the Netherlands and England and Wales.

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